

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA**

DOCKET NO. 2009-311-C

Genesis Telecommunications, LLC

v.

United Telephone of the Carolinas d/b/a CenturyLink

**United Telephone Company of the Carolinas, LLC d/b/a CenturyLink's
Post-Hearing Brief**

Filed: May 26, 2010

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IN RE: Genesis Telecommunications,)	UNITED TELEPHONE COMPANY OF
LLC, Complainant/Petitioner v. United)	THE CAROLINAS, LLC d/b/a
Telephone of the Carolinas d/b/a)	CENTURYLINK'S POST-HEARING
CenturyLink, Defendant/Respondent)	BRIEF
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In accordance with the direction of the Public Service Commission of South Carolina ("Commission") at the February 4, 2010 hearing in this docket, United Telephone Company of the Carolinas, LLC d/b/a CenturyLink ("CenturyLink") hereby submits its Post-hearing Brief in this matter.¹ CenturyLink's Proposed Order is being filed separately to accompany this Post-hearing Brief.

I. Introduction and Summary

The fundamental issue in dispute in this proceeding is whether the rates CenturyLink has billed Genesis Telecommunications, Inc. ("Genesis") for unbundled DS1 loops comply with the terms of the parties' interconnection agreements.² For five and a half years Genesis ordered and paid for UNE DS1 loops from CenturyLink at the rate set forth in the parties' interconnection agreements. In August 2008, Genesis began disputing these rates, first because it alleged it was getting xDSL loops instead of DS1 loops and then because it said the DS1 loops CenturyLink was providing were not DS1 loops as defined in the Agreement. In conjunction with filing the

¹ Citations to the Hearing Transcript will be noted in this Post-hearing Brief as "Tr."

² The parties entered into three separate interconnection agreements since December 2000. (Tr. 52-53) The most recent interconnection agreement, effective on July 18, 2008, is the Interconnection Agreement between CenturyLink and Genesis (Adoption of the BullsEye Agreement), Exhibit ALG-1, Composite Hearing Exh. 1 (which will be referred to herein as "Agreement").

disputes, Genesis began withholding self-determined amounts from its payments to CenturyLink for the DS1s. This dispute led to the Complaint filed by Genesis and the Counterclaim filed by CenturyLink that are the subject of this docket.

As described in detail in this Post-hearing Brief, Genesis failed to provide any affirmative evidence in support of its Complaint and filed only the summary, unsupported evidence of one witness to refute CenturyLink's Counterclaim. Genesis argued that no evidence is necessary because the contract is clear on its face and that, as a matter of law, the Commission should find in Genesis's favor. Contrary to the Genesis's arguments, under South Carolina law when the meaning of an agreement is ambiguous, as CenturyLink contends, the Commission cannot resolve a dispute concerning the meaning of a contract solely as a matter of law, but must look further to determine the contracting parties' intent.

In this dispute, the meaning of the term "megabyte" in the definition of "DS1 Loop" in the Agreement (which exactly mirrors the FCC definition of DS1 loop in its rules implementing UNE requirements) is unclear. Accordingly, CenturyLink has submitted evidence to demonstrate that the parties' intent when entering into the Agreement was to provide services, including DS1 loops, in accordance with applicable FCC rules and Orders and with prevailing industry standards. In addition, CenturyLink has presented both substantial testimony and documentary evidence to show that the appropriate speed for DS1 loops under long-standing and unrefuted industry standards is 1.544 Megabits per second (abbreviated as "Mbps"). CenturyLink has also demonstrated through unrefuted testimony that the DS1 loops it provides to Genesis comply with these industry standards, and are the same DS1 loops it provides within its own network to its own subscribers and to other competitive carriers.

Based on the legal principles of contract construction, the weight of the evidence presented to support CenturyLink's construction of the contract, and the absence of any competent evidence presented by Genesis, the Commission should find that CenturyLink has properly provisioned and billed Genesis for the DS1 loops it purchased under the Agreement. On this basis, the Commission should grant the relief requested by CenturyLink in its Counterclaim and require Genesis to 1) pay CenturyLink all past due amounts for DS1 loops and to continue going forward to pay the full amount billed by CenturyLink for DS1 loops, and 2) if Genesis fails to pay the amounts due, the Commission should allow CenturyLink to terminate services to Genesis as a result of Genesis's breach of the Agreement.

II. Legal Issues

At the hearing, counsel for Genesis made orally made a Motion for Summary Judgment and a Motion in Limine on the basis that Genesis was not required to present any evidence to support its Complaint because the dispute involves an interpretation of the interconnection agreement (i.e., contract) between the parties, which is a matter of law, not fact. (Tr. 5-6) The central point of Genesis's argument is that the Agreement requires the DS1 loops to provide a speed of 1.544 megabytes per second, while CenturyLink is actually providing a speed of 1/8th of what is required. In addition, at the hearing, CenturyLink made an oral motion to dismiss Genesis's Complaint for failure to submit evidence to support its Complaint and, therefore, failure to meet its burden of proof. CenturyLink asked the Commission to proceed on CenturyLink's Counterclaim, for which CenturyLink had presented substantial testimony and exhibits in support. (Tr. 9-10, lines) These two threshold legal issues are discussed below.

A. Burden of proof as to claim and counterclaim

1. Standard of proof is “preponderance of the evidence”

The evidentiary standard that applies to administrative complaints is a “preponderance of the evidence.”³ The courts have defined this standard to require the party with the burden of proof of a fact to show that the existence of the fact is more probable than its non-existence.⁴ To successfully meet this standard, the party asserting the fact must produce competent substantial evidence of its existence.⁵

In this proceeding, each party has the burden to prove its claim. That is, to succeed, Genesis must affirmatively prove its claim that CenturyLink did not provide the DS1 service Genesis ordered in accordance with the terms of the interconnection agreement, that Genesis paid more for the service provided by CenturyLink than was required under the Agreement, and that Genesis suffered the harm alleged in its Complaint as a result. On the other hand, to prevail on its Counterclaim CenturyLink must prove that it provided the UNE DS1 loops requested by Genesis, that Genesis failed to pay fully the bills for this service properly rendered by CenturyLink, and that CenturyLink suffered the harm alleged in CenturyLink’s Counterclaim.

2. Genesis provided no affirmative evidence to support its claim.

To prevail on its claim, Genesis must establish by a “preponderance of the evidence” that it overpaid CenturyLink for the DS1 UNE loops it ordered from CenturyLink and which CenturyLink provided. However, a review of the record shows that Genesis provided no such evidence. Therefore, Genesis’s claim must fail and should properly be dismissed or denied by the Commission.

³ S.C. Code Ann. § 1-23-600.

⁴ 30 S.C. Jur. Evidence § 17.

⁵ See, *Jackson v. Frier*, 146 S.C. 322, 144 S.E. 66 (1928).

First, Genesis failed to produce any direct evidence to support its Complaint. Genesis's witness, John Lawrence, explained this failure on the basis of Genesis's ignorance of the procedure and the law (Tr. 97, lines 11-18). However, Genesis, a limited liability company duly registered by the South Carolina Secretary of State and a competitive local exchange company that has been certificated in South Carolina since 2000, cannot reasonably be excused for its ignorance of the law and Commission procedure. In addition, nothing prevented Genesis from hiring an attorney to advise the company as to the proper law and procedures for pursuing their Complaint. In fact, Genesis is required to do so under Commission rules, though it only complied with the rules upon order of the Commission.⁶

Genesis took advantage of the opportunity to file Rebuttal Testimony to the Direct Testimony CenturyLink submitted on its Counterclaim. However, a review of the four pages of Rebuttal Testimony filed by Genesis shows that this testimony also fails to provide any evidence in support of Genesis's claim (the sufficiency of the testimony to refute CenturyLink's Counterclaim will be addressed subsequently). Genesis produced no information to support the nature of the services it ordered from CenturyLink, what services actually were provided, the rates it was billed by CenturyLink or the amount that Genesis paid for the services rendered. To succeed on its claim Genesis must prove, not imply, these facts, all of which are necessary elements for Genesis to meet its affirmative burden of proof. Because Genesis produced no evidence to support its claim that it had overpaid CenturyLink for services, Genesis's Complaint should be denied.

⁶ See, Commission Directive, Order No. 2010-10 in Docket No. 2009-311-C, issued 1-6-10.

3. CenturyLink met its burden of proof.

Unlike Genesis, CenturyLink filed testimony and exhibits to support its Counterclaim. The testimony and exhibits filed by CenturyLink met its burden of “going forward” with evidence to support its Counterclaim.⁷ As more fully discussed later in this brief, the evidence presented by CenturyLink is more than sufficient to establish by a preponderance of the evidence that CenturyLink provided UNE DS1 loops in accordance with the Agreement, and that Genesis failed to pay the amounts due to CenturyLink for the DS1 service CenturyLink provided. Therefore, on the basis of this evidence and the applicable law and rules, the Commission should find in favor of CenturyLink on its Counterclaim.

B. Rules of Contract Interpretation

1. The Commission must look at all provisions not just one in isolation.

Genesis’s counsel points only to a single sentence in the Agreement to support Genesis’s position that the DS1 loops provided by CenturyLink do not comply with the definition of DS1 loops in the Agreement. Genesis’s counsel asserts that this sentence is clear on its face and that, according to the legal principles of contract construction, the Commission must interpret these provisions as a matter of law without going outside the four corners of the Agreement to determine its meaning. In attempting to focus the Commission’s attention on this single sentence in the Agreement, Genesis’s counsel ignores many other relevant provisions within the four corners of the document itself, as well as fundamental principles of South Carolina law relating to the construction of contracts.⁸

⁷ See, *Smith v. Barr*, 650 S.E.2d 486,489 (S.C. Ct. App. 2007) for an explanation of the “burden of going forward” and the “burden of persuasion.”

⁸ See, e.g., *Koon v. Fares*, 379 S.C. 150, 666 S.E. 2d 230 (2008) (describing the purpose of the rules of contract construction to ascertain the intent of the parties, which should be gathered from the entire document, not just one

The single sentence that Genesis's counsel points to is found in the definition of a DS1 loop in the parties' interconnection agreement at Part A, Section 1.44. The full definition reads as follows:

1.44 "DS1 Loop" is a digital Local Loop having a total digital signal speed of 1.544 megabytes per second. DS1 Loops include, but are not limited to, two-wire and four-wire Copper Loops capable of providing high-bit rate digital subscriber line services, including T1 services.

This definition is taken verbatim from the FCC rule setting forth the requirements for the provision of unbundled network elements by ILECs.⁹

Genesis infers (without any supporting evidence in the record) many things from this one isolated sentence, including: that the Agreement requires CenturyLink to provide DS1 loops to Genesis that are capable of a speed of the 1.544 megabytes; that a byte is equivalent to 8 bits; that the service CenturyLink is providing is 1/8th of the speed required by that sentence in the Agreement; and that, therefore, the Agreement requires Genesis to pay only 1/8 of the rate set forth in the Agreement for DS1 service. Genesis's focus on this single sentence and its resulting assumptions are flawed and should be rejected by the Commission because they ignore numerous other provisions of the Agreement (including the second sentence of the definition itself). Importantly, Genesis's singular focus on this one sentence ignores the many provisions of the Agreement that require the parties to consider relevant FCC and Commission rules and orders, as well as applicable industry standards, when construing its terms. The referenced sources indicate that the appropriate speed for the UNE DS1 loops CenturyLink is required to

particular provision). See, also, *Middleton v. Eubank*, ---S.E. 2d---, 2010 WL 1657242 (S.C. Ct. App. 2010) (setting forth the principle that the "cardinal rule" of contract interpretation is to ascertain the intent of the parties as determined by the contract language but that if the contract is deemed ambiguous then the fact finder must ascertain the parties' intentions from the evidence presented); *Madden v. Bent Palm Investments*, 386 S.C. 459, 688 S.E. 2d 579 (Ct. App. 2010) (providing that where the language of a contract is subject to multiple interpretations, the fact finder must determine the parties' intentions through the evidence presented); *Silver v. Aabstract Pools & Spas, Inc.* 376 S.C. 585, 658 S.E. 2d 539 (Ct. App. 2008) (providing that whether a contract is ambiguous must be determined from the entire contract and not from isolated portions of the contract).

⁹ 47 U.S.C. §51.319(a)(4).

provide under the Agreement is the industry standard DS1 speed of 1.544 Megabits per second. Genesis ignores these other provisions of the Agreement presumably because they contradict Genesis's position that CenturyLink is not complying with the terms of the Agreement in its provision of UNE DS1 loops.

2. Relevant Agreement terms

Whether a contract is ambiguous is a question of law which must be decided by looking at the contract as a whole.¹⁰ When looking at the Agreement as a whole, it appears that there is an ambiguity in the meaning of the term "megabyte" in the definition of a DS1 loop. First, the term "megabyte" itself is not defined. The contract states that when a term is not defined, the parties are to construe such terms "in accordance with their customary usage in the telecommunications industry as of the Effective Date of this Agreement." (Agreement, Part A, Section 1.1, p. 2) However, the term "megabyte" is a technical term, more commonly used in the computer environment than the telecommunications environment. (Tr. 48, lines 17-20; 68, lines 18-19) In addition, there is no hard, fast delineation of the meaning of a "byte" in relation to a "bit" (which is the crux of the dispute between the parties). (Tr. 48, lines 22-25; 68, lines 15-19) Therefore there is no clear meaning to be ascertained solely from the common usage of the term within the telecommunications industry.¹¹

¹⁰ See, *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C.585, 591,658 S.E.2d 539, 542 (Ct. App. 2008).

¹¹ See, *Newton's Telecom Dictionary*, (18th ed. 2002 and 25th ed. 2009), which defines, in relevant part, the term "byte" as follows:

Byte Abbreviated as "B" (big "B"). A set of bits (ones and zeros) of a specific length represent a value, in a computer coding scheme. A byte is to a bit what a word is to a character, which is why a byte sometimes is referred to as a "word". A byte might represent a letter, number, punctuation mark or other typographic symbol (e.g., ,, , \$, @, &, or !), or control character (e.g., carriage return, line feed, beginning/ending flag, or error check). The term generally is thought as designating a computer value consisting of eight bits, which technically is known as a "physical byte". For example, ASCII code makes use of an 8-bit byte, comprising seven information bits and one parity bit for error control. EBCDIC (IBM's invention) makes use of an 8-bit byte, with all bits being information bits. In some circles, a byte is called an octet. This is the case in the world of broadband networking, although an octet, more correctly, is a set of 8 bits, which may comprise more than one byte. A "logical byte" as opposed to a "physical byte," may comprise fewer than 8 bits, or more. A 4- bit byte is often referred to as a "nibble," proving

Not only is the term “megabyte” not defined in the Agreement, nor can the meaning be clarified solely by resort to standard industry usage, but the remainder of the definition itself reflects some inconsistency in the use of the term. The second sentence of the definition refers to DS1 loops as “high-bit rate” subscriber line services, which implies that the speed at which DS1 service is to be provided is measured in bits. In fact, as Mr. Showers demonstrates through his testimony and related Exhibits, megabits are the industry standard measurement for DS1 speed. (Tr. 61-62; 66-67, Composite Hearing Exh. 2)

The section of the Agreement that establishes CenturyLink’s obligation to provide unbundled network element loops generally, and DS1 loops specifically, casts further doubt on the use of the term “megabyte” in the definition section. (Agreement, Part E, Section 45.8.7, p. 56) This provision refers to ANSI standards, which, as Mr. Showers explains, define DS1 speed using the industry standard 1.544 Megabits per second. (Tr. 61-62, Composite Hearing Exh. 2) Finally, provisions of Table One, which contain the rates that CenturyLink has billed Genesis for the DS1 service provided, inject further confusion concerning the definition and speed of DS1 loops. In the UNE loop section, the price list contains rates for “DS1 service, ISDN PRI loops” which is the service CenturyLink is providing to Genesis and the rates it has billed Genesis for this service.

that humor is pervasive, even in the world of computer code. A byte can consist of more than 8 bits, as is the case with Unicode, which involves 16-bit bytes. Unicode is a standard coding scheme used to accommodate complex alphabets such as Chinese and Japanese. Note that computer storage capacity is measured in bytes, while transmission capacity and speed (also called bandwidth) is measured in bits per second (bps). The exceptions to this rule are Fibre Channel, ESCON and other transmission standards which are used in Storage Area Networks (SANs); those standards measure bandwidth in Bytes per second (Bps). See also Bps and Byte Count. The definition of “Bps” begins: “Bps is confusing. Is it bits per second or bytes per second? In telecommunications, bps always means bits per second. In computing, BPs (note the capital “B”) often means bytes per second. But don’t trust people to always be correct—using the correct upper or lower case “B.” You have to figure out what context you’re working in. The ‘Rule of Thumb’ is that outside the computer, in the telecom world—and that means from the computer to the world, on the USB on the LAN on the local loop, on the WAN, across the county, across the ocean—it’s bits per second...” These definitions have remained the same throughout subsequent editions of the dictionary, through the current 25th edition published in 2009.

Because the use of the undefined term “megabyte” renders the meaning of the term “DS1 loop” ambiguous when looking within the four corners of the interconnection agreement itself, the Commission may look outside the agreement to determine the parties’ intent regarding the provision of and billing for UNE DS1 loops.¹² South Carolina case law is clear that this inquiry into the intent of the parties is a question of fact that must be ascertained through the evidence produced by the parties at the hearing.¹³ Because there are factual disputes that must be determined to determine the parties’ intent, Genesis’s Motion of Summary Judgment and Motion in Limine should be denied.

III. The Parties’ Intent regarding DS1 Loops Under the Contract

A. The Contract is governed by FCC Rules and Orders

As discussed above, the question of the parties’ intent as to the meaning of an ambiguous term in a contract is a question of fact to be decided based on the evidence presented. While the discrepancies in the Agreement’s use of the terms “megabyte” and “megabit” in describing DS1 loops allows the Commission to go outside the four corners of the agreement to determine the parties’ intent, in any event the Agreement itself requires the parties to go outside its “four corners” by expressly providing that the federal Telecommunications Act (47 USC §§ 151 et. seq.) and the FCC rules and orders implementing the Act are to be considered in interpreting the parties’ rights and obligations. (Agreement, 4th Whereas clause, page 1; Part B, Section 4.2, p.

¹² See, e.g., *Madden v. Bent Palm Investments*, 386 S.C. 459, 688 S.E. 2d 597 (Ct. App. 2010), citing *Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106 S.E. 2d 455, 456 (1959), (“finding that when the contract is ambiguous in its terms other evidence must be considered to ascertain the intent of the parties.”).

¹³ See, e.g., *Middleton v. Eubank*, ---S.E. 2d ---, 2010 WL 1657242 (S.C. App. 2010), citing *Duncan v. Little*, 384 S.C. 420, 424, 682 S.E. 2d 788, 790 (2009) (“if a contract is deemed ambiguous, the fact finder must ascertain the parties’ intentions from the evidence presented.”).

15 and Section 18, p. 29)¹⁴ There are several provisions of the referenced FCC rules and orders that are relevant to interpreting CenturyLink's obligation to provide UNE DS1 loops to Genesis.

As noted previously, the definition of DS1 loops incorporated into the Agreement mirrors the FCC's definition of UNE DS1 loop in Rule 47 C.F.R. § 51.319. It is unclear why the FCC used the term megabyte instead of megabit in its definition. In discussing the technical specifications for DS1 UNE loops in the TRO Order that gave rise to the rule, the FCC correctly references the 1.544 Mbps speed that is the commonly recognized industry standard for DS1s. (Tr. 63-64)¹⁵ However, in codifying the Mbps abbreviation used in the Order into the rule, the

¹⁴ At the hearing, Genesis's counsel asked Mr. Showers if the FCC rules and orders cited in his testimony were incorporated into the interconnection agreement. Mr. Showers correctly responded that they are. (Tr. 72, lines 22-23).

¹⁵ See, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Service Offering Advanced Telecommunications Capability*, FCC Docket Nos. 01-338, 96-98 and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("TRO") ¶ 202 at footnote 634. Specifically, the footnote says:

A DS1 is a 1.544 Mbps first-level signal in the digital transmission hierarchy. In the time division multiplexing hierarchy of the telephone network, DS1 is the initial level of multiplexing. Traditionally, 24 64 kbps DS0 channels have been multiplexed up to the 1.544 Mbps DS1 rate, with each DS0 channel carrying the digital representation of an analog voice channel. See TELCORDIA, INC., NOTES ON THE NETWORK, TELCORDIA TECHNOLOGIES SPECIAL REPORT, SR-2275, Issue 4, Oct. 2000, Glossary at 46 (TELCORDIA NOTES ON THE NETWORK). DS1 loops are provided over various transmission media and combinations of transmission media, including but not limited to two-wire and four-wire copper, fiber optics, or radio. DS1 loops may be channelized typically into up to 24 DS0 channels of 56/64 kbps each, or unchannelized, *i.e.*, providing a continuous bit stream for data (such as frame relay, ATM, or Internet access) or other customer applications. We note that throughout the record in this proceeding parties use the terms DS1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, *i.e.*, High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps. See NEWTON'S TELECOM DICTIONARY 242 (18th ed. 2002) (definition of DS1); *id.* at 718 (definition of T1); see also ENGINEERING AND OPERATIONS IN THE BELL SYSTEM 198-201 (R.F. Ray Technical ed., 2d ed. 1983) (channelization process for transmission of telecommunications), 369-73 (technical characteristics of DS1 loops), 386-93 (describing T-carrier hierarchy and necessary equipment); TELCORDIA, INC., NOTES ON THE

FCC spelled out the abbreviation as “megabyte”, either through a mistaken assumption that the terms were interchangeable (Tr. 71) or through a simple typo (Tr. 79). While we cannot know for certain the reason for this erroneous transcription, it is undisputed that both prior to and subsequent to the adoption of the rule, 1.544 Megabits per second is and has been the industry standard for the provision of DS1s. (Tr. 61-62)

The fact that the definition of DS1 loops containing the questioned term “megabytes” in the Agreement replicates the definition using this same term in the FCC Rule is significant. The principles of South Carolina law relating to the construction of contracts typically require that an ambiguity in a contract’s terms is to be construed against the drafter.¹⁶ No specific evidence was offered to show who drafted the language in question.¹⁷ Regardless, that principle is not applicable here, where the parties clearly intended the Agreement to conform to FCC regulations and where the questionable term was drafted by the FCC.

It is significant that DS1 loops are “unbundled network elements” that CenturyLink is required to provide to competing carriers under the Act and FCC Rules implementing the Act.¹⁸ The definition of “network element” in the Agreement refers specifically to the definition in the Act. (Part A, Section 1.80, p. 9) The Act defines “network element” to mean:

a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.¹⁹

NETWORK, SR-2275, section 7.7 (Dec. 2000) (describing digital data services provided over local loops) at 7-23 (overview of DS hierarchy).

¹⁶ For the general rule, see, 30 S.C. Jur. Contracts § 41.

¹⁷ Interconnection agreements often result from protracted negotiations of terms between the parties, including discussions concerning the meaning of FCC rules and orders and how those rules and orders are to be reflected in the agreements terms. In this case, Genesis chose to adopt an existing agreement that had been negotiated between CenturyLink and another carrier (BullsEye). (Tr. 21)

¹⁸ See, 47 U.S.C. § 251(c)(6) and 47 C.F.R. 51.307-51.321.

¹⁹ 47 U.S.C. §153 (29).

The FCC has elucidated the ILECs' obligations to provide these network elements (including DS1 loops) in numerous orders promulgated to implement the Act.²⁰ Importantly, the the Act does not require ILECs to build UNEs for requesting CLECs but only to provide those elements as they exist within the ILEC's network. In this vein, 47 CFR s. 51.311 provides that ILECs may not discriminate in their provision of UNEs but must provide them to CLECs in the same manner as they provide them to themselves, their affiliates, their subscribers and other carriers. The requirements of the Act and the FCC rule are important to this case because, as Mr. Showers testified, the DS1 loops CenturyLink has provided to Genesis are the same DS1 loops CenturyLink uses in its own network. (Tr. 137)

In addition, the FCC rules are explicit as to how the prices for UNEs are to be set. Specifically, Rule 47 C.F.R. §51.503 requires ILECs to price UNEs using "total element long run incremental costs" or "TELRIC." As testified by CenturyLink's witness, Mr. Burge, CenturyLink's UNE rates included in the interconnection agreement adopted by Genesis were developed using TELRIC, were never challenged by Genesis (or any other South Carolina CLEC) and were approved by the Commission through approval of the interconnection agreements containing the agreed-to rates. (Tr. 49-50)

²⁰ See, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (1996); Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696 (1999) ("UNE Remand Order,"); *TRO*, *supra*; *In the Matter of Unbundled Access to Network Elements Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Companies*, CC Docket No. 01-338, 20 FCC Rcd 2533 (2005) ("TRRO").

B. Industry standards

Both the FCC rules and orders and the Agreement itself rely on industry standards to determine the appropriate meaning of terms and the course of dealing between ILECs and CLECs.²¹ Related specifically to this dispute are the ANSI standards referenced in Section 45.8.7 of Part E of the Agreement. (Part E contains the Agreement's provisions dealing with provision of unbundled network elements, including loops, generally, while Section 45 addresses the provision of DS1 loops specifically.) Mr. Showers discusses, and includes as Exhibits, relevant ANSI-approved standards that define the parameters and speed of the DS1 element. (See, Tr. 61, lines 10-14 and Composite Hearing Exh. 2)²² As is evident from the documents included in the Exhibits, a DS1 categorically provides 1.544 Mbps (Megabits per second) of speed. And, as Mr. Showers testified, CenturyLink follows these standards in its provisioning of DS1s and specifically its provisioning the DS1 loops to Genesis. (Tr. 65, 138) To do otherwise would not be technically feasible, as Mr. Showers stated. (Tr. 62, lines 17-18)²³

C. Extrinsic evidence

In addition to the evidence supporting CenturyLink's position found in the FCC rules and orders and the industry standards referenced in the Agreement, extrinsic evidence regarding general industry practice and the course of dealing between the parties also supports that

²¹ TRO ¶ 202 at footnote 634, *supra*; Agreement at Part E, Section 45.8.7, p. 56.

²² In response to cross-examination by Genesis's counsel, Mr. Showers stated that his assertions regarding the specific industry working group referenced in Section 45.8.7 were subject to check. (Tr. 75) Further review confirms the accuracy of Mr. Showers statements, as the standards attached to Mr. Showers testimony are incorporated by reference and integral to standards promulgated by the specific group referenced in the Agreement. See, Late-filed Hearing Exh. 6, submitted separately on this same day.

²³ See, *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E. 2d 230 (2008) ("an interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided").

CenturyLink properly provided and billed DS1 loops to Genesis.²⁴ South Carolina courts recognize the use of extrinsic evidence to show the parties' intent.²⁵

First, as Mr. Showers affirmed, the DS1 speed that CenturyLink provides with its UNE DS1 loops is identical to the DS1 loop standard applied ubiquitously in the national telecommunications network and by all other carriers, including AT&T and Verizon, for use in their own networks and for the DS1 UNEs they provide to other carriers. (Tr. 66-67) In addition, Mr. Showers testified that the DS1 loops CenturyLink provides to Genesis are the same as the DS1 loops CenturyLink uses in its own network and provides to its subscribers and other carriers, in accordance with the FCC's UNE rules. (Tr. 137, lines 9-13) Genesis does not dispute or provide any evidence to refute Mr. Showers' testimony.

In addition to Genesis's failure to dispute that the DS1 loops provided by CenturyLink comport with general industry standards, the course of dealing between the parties also demonstrates that during the first six years of the implementation of the parties' interconnection agreements, Genesis did not question the speed of the DS1 product being provided by CenturyLink. To the contrary, the evidence shows that during this time period Genesis continued to order, use and pay for the DS1 loops without dispute. (Tr. 23) As Mr. Burge affirmed in response to a question from Commissioner Howard, since December 2000 the parties negotiated three separate interconnection agreements containing the identical language to the language in dispute here, the most recent in July 2008, without Genesis raising any discrepancy concerning the definition of DS1 loops and the UNE DS1 loops CenturyLink was providing. (Tr. 52-53)

²⁴ As discussed above, under South Carolina law, extrinsic evidence is admissible to ascertain the intent of the parties to a contract and is a question of fact to be determined by the Commission.

²⁵ See, *Hawkins v. Greenwood Development Corporation*, 328 S.C. 585, 592, 493 S.E.2d 875, 878-879 (Ct. App. 1998) ("Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties."). See also, *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 592, 658 S.E. 2d 53 (Ct. App. 2008) (In this case involving a contract that was deemed to be unambiguous, the court nonetheless recognized that "Homeowner's actions in making the first three payments according to the schedule set forth in the parties' written contract indicates the Homeowner and contractor shared a common understanding of the payment terms.").

In answer to a question from Commissioner Mitchell, Mr. Lawrence implies that he was too unsophisticated regarding technical matters to know that Genesis wasn't getting the product defined in the agreement and that he became aware of a discrepancy only as a result of a customer complaint that possibly occurred sometime in the 2008 time frame. (Tr. 99-100) However, it defies logic that Genesis provided service using CenturyLink's DS1 loops for more than five years before any indication of the alleged deficiencies became evident to either Genesis or its customers. Clearly, Genesis's behavior during the course of its dealings with CenturyLink indicates that during the time period when Genesis was ordering and using the majority of its DS1 UNEs, Genesis understood the elements provided to comport with the terms of the Agreement.

D. Genesis has failed to provide evidence to support its position.

While CenturyLink has provided substantial evidence to support its position that the DS1 loops it has provided Genesis comply with the parties' intent under the interconnection agreement, Genesis has provided virtually no evidence to support its position to the contrary. Rather, Genesis's "evidence" consists entirely of unsubstantiated statements by Mr. Lawrence, who by his own admission lacks significant knowledge about the technical standards applicable to the telecommunications industry. (Tr. 111-112)

For instance, Mr. Lawrence unilaterally asserts that the service CenturyLink is providing constitutes $1/8^{\text{th}}$ of the speed represented by the definition of a DS1 in the interconnection agreement, but provides absolutely no independent support for the proposition and barely any explanation as to how it was calculated. (Tr. 90, lines 22-24) Indisputably there is nothing in the interconnection agreement that supports this conclusion, as neither the term "byte" nor "bit" is

defined. In addition, Mr. Lawrence has provided no extrinsic evidence to support Genesis's claim that this interpretation reflects the parties' intent.

Even if one assumes Genesis's argument regarding the speed of DS1s was correct (which it is not), there is no foundation in the interconnection agreement for the proposition that the appropriate rate for the loops CenturyLink is providing would be 1/8th of the Agreement rate set out in Table One. To the contrary, the Agreement explicitly provides a process for CenturyLink to determine an "individual case basis" rate for the provisioning of UNEs when a rate for an element is not listed in Table One. (Agreement, Part E, Section 43, p. 49) And, as discussed above, the FCC rules require UNE rates to be set at TELRIC. Genesis has made no attempt to argue that 1/8th of the contract rate represents CenturyLink's TELRIC costs for providing a loop that provides 1.544 Megabits per second of speed.

E. CenturyLink's provision of DS1 complies with Agreement

CenturyLink has clearly demonstrated through its evidence that the parties' intent was that CenturyLink provide UNE DS1 loops in accordance with the industry standards and practice. CenturyLink has also provided substantial evidence to prove that the industry standard and practice for DS1 loops is a speed of 1.544 Megabits per second. Genesis has provided no competent evidence that the parties' intent was to require DS1 loops to be provided at a speed eight times the demonstrated standard, which Mr. Showers has testified would not be feasible in any event. (Tr. 62, lines 17-18)²⁶ Based on the legal principles of contract construction, the weight of the evidence presented to support CenturyLink's construction of the contract, and the dearth of competent evidence presented by Genesis, the Commission should find that

²⁶ It is this undisputed infeasibility that led to Mr. Burge's speculation that Genesis's true purpose in raising this dispute was to receive an unjustified discount on CenturyLink's contract rates for the DS1 service. (Tr. 55)

CenturyLink has properly provisioned and billed Genesis for the DS1 loops it purchased under the Agreement.

IV. Billing and Payment Issues

A. Services CenturyLink provided and billed

In addition to the primary issue of whether CenturyLink's provisioning and billing of DS1 loops comports with the parties' intent under the Agreement, which should be resolved in CenturyLink's favor as discussed above, CenturyLink also has presented evidence regarding the amount it has appropriately billed Genesis for DS1 loops. In addition, CenturyLink also has provided evidence concerning the amount that Genesis owes CenturyLink, as a result of short paying CenturyLink's bills, based on the two separate disputes it has filed beginning in August 2008. This evidence is necessary to support the relief CenturyLink is requesting from the Commission, which is: 1) to require Genesis to pay the past due balance it owes CenturyLink and to pay CenturyLink's full DS1 rates going forward; and 2) to allow CenturyLink to terminate its services to Genesis as a result of Genesis's breach of the interconnection agreement if Genesis fails to pay for the services rendered.

As set forth in Mr. Burge's testimony from the period of July 16, 2008 through March 16, 2009, CenturyLink billed Genesis \$67.81 for each Band One DS1 loop and \$102.76 for each Band Three DS1 loop, while Genesis paid only \$29.40 for each of these loops. (Tr. 25) For the period of April 15, 2009 through the present, CenturyLink has billed Genesis \$67.81 for each Band One DS1 loop and \$102.76 for each Band Three DS1 loop, while Genesis has paid only \$8.48 and \$12.85 for each of these Band One and Band Three loops, respectively. (Tr. 30) As of January 12, 2010 (the date CenturyLink's Direct Testimony was filed), the amount Genesis had short-paid CenturyLink was \$129,710.68. (Tr. 31) As Mr. Burge noted in his testimony, the

amount Genesis owes CenturyLink has continued to grow while this dispute is pending, as Genesis continues to pay the self-determined amount of \$8.48 and \$12.85 for each of the Band One and Band Three DS1 loops provided by CenturyLink, instead of the billed rates of \$67.81 and \$102.76, respectively. In addition, the interconnection agreement provides for late charges to apply to disputed amounts when the dispute is determined not be valid. (Agreement at Part B, Section 7.4, pp. 19-20) Again, this amount will continue to grow until the Commission rules on the dispute between the parties.

B. Rate if Commission determines that the DS1 loops CenturyLink provides do not comply with the interconnection agreement

CenturyLink believes that it has provided more than sufficient evidence to support its position in this docket and to allow the Commission to find in favor of CenturyLink on its Counterclaim. However, assuming for the sake of argument that the Commission finds that CenturyLink is not providing DS1 loops as defined in the Agreement (i.e., that it is providing megabits instead of megabytes) there is nothing in the Agreement or the evidence provided in this proceeding to support a finding that Genesis owes CenturyLink only 1/8th of the DS1 loop rates set forth in Table One of the Agreement. Instead, as discussed above, Part E, Section 43 of the Agreement sets forth the procedure for establishing rates for network elements when the rates are not otherwise specified in Table One. Under that process, CenturyLink will establish a rate in accordance with the TELRIC principles required for unbundled network elements under FCC rules. (Tr. 50) Should the Commission decide that the rates for DS1 service set forth in Table One are not the appropriate rates for the loops CenturyLink is providing Genesis (which CenturyLink believes it should not), the Commission should find that the process in Part E, Section 43 of the Agreement applies and that CenturyLink should develop the appropriate rates

for these loops (applicable both retroactively and prospectively) in accordance with this process and the governing FCC Rules.²⁷

V. Conclusion

Through its arguments and evidence, CenturyLink has demonstrated that the parties' intent underlying the parties' interconnection agreement was that CenturyLink would provide UNE DS1 loops in accordance with FCC regulations and the industry standards and practice. CenturyLink has also provided substantial evidence that the DS1 speed that CenturyLink provides to Genesis with its UNE DS1 loops is identical to the DS1 loop standard applied ubiquitously in the national telecommunications network, as well as by all other carriers in their own networks and in the DS1 UNEs they provide to other carriers.

Based on the legal principles of contract construction, the weight of the evidence presented to support CenturyLink's construction of the contract, and the complete lack of competent evidence presented by Genesis, the Commission should deny Genesis's Motion for Summary Judgment and Motion in Limine and find that CenturyLink has properly provisioned and billed Genesis for the DS1 loops it purchased under the Agreement. Based on Genesis's failure to meet its burden of proof as to its Complaint, the Commission should deny the Complaint. Applying the applicable law and considering the evidence submitted by CenturyLink in support of its Counterclaim, the Commission should find in favor of CenturyLink on its Counterclaim and order Genesis to pay the past due amounts for the DS1 loops CenturyLink has provided and continues to provide to Genesis during the pendency of this dispute. If Genesis does not pay the past due amount and continue to pay the appropriate Agreement rate for DS1

²⁷ The applicable statute of limitations period for actions relating to contracts under South Carolina law is three years. S.C. Code Ann. § 15-3-530.

loops, the Commission should allow CenturyLink to terminate the services to Genesis as a result of Genesis's breach of the Agreement.

Respectfully submitted this 26th day of May 2010.

A handwritten signature in blue ink, appearing to read "Scott Elliott", is written over a horizontal line.

Scott Elliott, Esquire
Elliott & Elliott, P.A.
721 Olive Street
Columbia, SC 29205
803-771-0555 (phone)
803-771-8010 (fax)
selliott@elliottlaw.us

Susan S. Masterton, Esquire
CenturyLink
315 South Calhoun Street, Suite 500
Tallahassee, FL 32301
850-599-1560 (phone)
850-224-0794 (fax)
susan.masterton@centurylink.com

Counsel for United Telephone Company of
the Carolinas d/b/a CenturyLink